A.P.S. MARKETING, INC. v. R.S. HANLINE & CO., INC.
PACA Docket No. R-99-0058.
Decision and Order filed on February 9, 2000.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $44,207.29 in connection with transactions in interstate commerce involving mixed perishable produce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant.

The amount claimed in the formal complaint exceeds $30,000.00, however, the parties waived oral hearing, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's Report of Investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however neither party did so. Neither party filed a brief.

Findings of Fact

1. Complainant, A.P.S. Marketing, Inc., is a corporation whose address is 1025 W. Sunnyside Ave., Visalia, California.

2. Respondent, R.S. Hanline & Co., Inc., is a corporation whose address is P.O. Box 494, Shelby, Ohio. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about the dates set forth below Complainant sold to Respondent on an f.o.b. basis, and shipped from loading points in California to Respondent in Shelby, Ohio, or brokered on Respondent's behalf, perishable produce which Complainant invoiced as follows:

Inv./Cus PO/PO/ Shp.date	Pkgs.	Commodity	Amount

654	1110	Cantaloupes 12's @ 6.50	$ 7,215.00
59406		Cox Recorder	23.50
FC1042		Freight Charge	3,600.00
5/31/97			$10,838.50
658	1980	Superior Seedless Grapes BG 18# @ 16.75	$33,165.00
59422		Freight Charge	3,200.00
FC1044		Cox Recorder	23.50
6/2/97			$36,388.50
730	1089	Thompson Seedless Grapes 18# Bag @ 6.50	$ 7,078.50
59577	990	Flame Seedless Grapes 18# Bag @ 10.25	10,147.50
FC1053	1	Cox Recorder	23.50
6/21/97	1	Air Bag	10.00
			$17,259.50
791	360	Red Flame Grapes 19# Bag @ 9.75	$ 3,510.00
PU# 6880	360	Thompson Seedless Grapes 19# Bag @ 9.75	3,510.00
FC1839	1	Freight Charge	1,120.00
8/6/97		Cox Recorder	23.50
			$ 8,163.50
792	360	Honeydew 6 pack @ 3.00	$ 1,080.00
	1	Freight Charge	840.00
FC1838			$ 1,920.00
8/6/97			
736	229	Liner Lettuce 24 pack @ 12.50	$ 2,862.50
Hnln 60013		Cox Recorder	23.50
FC1842			$ 2,886.00
9/4/97			
770	1694	Red Glove Grapes 21#PP @ 4.25	$ 7,199.50
Hnln 186	1	Air Bag	10.00
FC1842A	1	Cox Recorder	23.50
9/9/97			$ 7,233.00
708	216	Brokerage on Cantaloupes size 12 @ 0.25	$ 54.00
	216	Brokerage on Cantaloupes size 15 @ 0.25	54.00
FC 1061			$ 108.00
7/10/97			
733	1120	Brokerage on Cantaloupes size 9 @ 0.25	$ 280.00
Hnln 1850			
FC1840			
8/14/97			

734 1120 Brokerage on Cantaloupes size 12 @ 0.25 $ 280.00
Hnln 1841
FC1841
8/16/97

4 The informal complaint was filed on November 12, 1997, which was within nine months after the causes of action herein accrued.

Conclusions

Complainant seeks to recover $44,207.29 in connection with the sale to Respondent of seven shipments of produce, and the brokering of three shipments. Respondent raises substantive defenses as to each shipment. We will treat each in turn.

The shipment designated by Complainant's invoice 654 consisted of 1,110 cartons of size 12 cantaloupes sold to Respondent for $6.50 per carton f.o.b., and shipped on May 31, 1997. A portion of the load was federally inspected at Respondent's place of business in Shelby, Ohio, on June 4, 1997, at 3:25 P.M. That inspection disclosed the following information, in relevant part:

LOT: A
TEMPERATURES:4? To 41°F
PRODUCT: Cantaloupes
BRAND/MARKINGS:"Sucassa Produce" (12 Count)
ORIGINS: MX
LOT ID.:
NUMBER OF CONTAINERS: 821
INSP. COUNT: Y
LOT: B
TEMPERATURES:4? To 42°F
PRODUCT: Cantaloupes
BRAND/MARKINGS:"No Brand" Net Wt 36 LBS, (12 Count)
ORIGINS: MX
LOT ID.:
NUMBER OF CONTAINERS: 56
INSP. COUNT: Y

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	12 %	03 %	00 %	Sunken Dark Areas (0 to 33%)	Each lot: Mostly ripe and
	04 %	00 %	00 %	Bruising	firm, Some firm. Ground
	04 %	04 %	00 %	Decay (0 to 17%) Generally early stages	color mostly yellow, many turning yellow.
	20 %	04 %	00 %	Checksum	
B	13 %	02 %	00 %	Sunken Dark Areas (8 to 17)	

02 %	02 %	00 %	Decay
15 %	04 %	00 %	Checksum

GRADE:

For some reason 233 cartons of the cantaloupes were not inspected. These melons must be averaged in with the melons inspected to determine whether there was a breach. The bill of lading lists all the melons as “Sucassa” label, and we will assume that the 56 cartons that were not so labeled were an anomaly, and that the 233 cartons that were not included in the inspection had the “Sucassa” label. If we assume that the 233 cartons contained no defects and average them in with the 821 cartons, we arrive at an average of 15.58 percent defects for the lot. Since the distance between the shipping point in Arizona and the Shelby, Ohio destination is approximately 2,000 miles, the transit period should have been slightly less than 3 days. The percentage of condition defects that we would allow in order to make good delivery under the suitable shipping condition rule is 13 percent, and if we use the four day period between shipment and time of inspection, we would allow 14 percent. Accordingly, although these cantaloupes were close to making good delivery, they did not made good delivery. This was the premise upon which the parties modified the contract to call for price after sale terms.

Neither the UCC nor the Act recognizes the term "Price After Sale". The term has been held to be a subcategory of "Open Price."[1] The Uniform Commercial Code, section 2-305(1), states:

> Open Price Term:
>
> (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if
>
> (a) nothing is said as to price; or
>
> (b) the price is left to be agreed by the parties and they fail to agree; or
>
> (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

Thus “price after sale” or “Open Price” assumes that the parties will negotiate a price after the goods are sold. If they do not, the reasonable value of the goods

[1] *Well Pict, Inc. v. Ag-West Growers, Inc.*, 39 Agric. Dec. 1221, 1227-1228 (1980).

should be imputed.[2] We have stated that although the Regulations do not place a duty to account upon a buyer who purchases on an open basis, should the parties fail to reach an agreement as to price the receiver fails to account accurately and in detail at its own risk.[3] In this case Respondent did not render a detailed accounting of the resale of the cantaloupes. Accordingly we will look to applicable market reports as a guide to determining a reasonable price. The closest market to Shelby, Ohio is Pittsburgh, Pennsylvania. Size 12 cantaloupes from Mexico were selling on that market on June 5, 1997, for $10.00 to $12.50. Since the subject cantaloupes contained a little more condition defects than is concordant with good delivery we will use the lower figure of the price range, or $10.00, rather than the average price. Applying this figure the market value of the load was $11,100.00. From this amount should be deducted a 20 percent profit, or $2,220.00.[4] Since Complainant billed Respondent $3,600.00 for freight we assume that freight was paid by Complainant, and should not be deducted in the computation of reasonable value. We conclude that the reasonable value of the load of cantaloupes was $8,880.00. Respondent claimed in its answer to have already paid Complainant $3,353.50 on this load, and Complainant made no reply to this allegation. We conclude that $5,526.50 remains due on this load.

The shipment designated by Complainant's invoice 658 consisted of 1,980 cartons of Superior Seedless grapes sold to Respondent for $16.75 per carton f.o.b., and shipped on June 2, 1997. Respondent asserts that the grapes were misbranded, and Complainant, in correspondence included in the Department's Report of Investigation concurred. Furthermore Respondent alleged that Fred Chaseley, who acted as an agent for, and was employed by, both Complainant and Respondent, instructed Respondent to pay at the rate of $9.00 per carton. The returns on the grapes were slightly less than this amount, and although the grapes were shipped to other firms to be handled on a price after sale basis, correspondence in the Report of Investigation from Complainant shows that Complainant concurred in this disposition. Respondent has paid Complainant at the agreed rate which amounted to a total of $21,043.50 when freight was included. We conclude that Respondent does not owe Complainant any further payment on this load.

The shipment designated by Complainant's invoice 730 consisted of 1,089 cartons of Thompson Seedless grapes invoiced to Respondent for $6.50 per carton f.o.b., and 990 cartons of Flame Seedless grapes invoiced to Respondent for $10.25 per carton f.o.b. This load was shipped on June 21, 1997, and included one Cox

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[2] *PACA Doc. No. 4456*, 5 Agric. Dec. 494 (1946). See also *J. Macchiaroli Fruit Co. v. Ben Gatz Co.*, 38 Agric. Dec. 565 (1979).

[3] *Ronnie Carmack v. Delbert E. Selvidge*, 51 Agric. Dec. 892 (1992).

[4] *C.J. Prettyman, Jr., Inc. v. American Growers, Inc.*, 55 Agric. Dec. 1352 (1996).

recorder for $23.50, and one air bag for $10.00, or a total for the load of $17,259.50. Following arrival at destination in Shelby, Ohio, the 1,089 cartons of Thompson Seedless grapes were federally inspected and found to grade U.S. No. 1 Table, with the notation: "Fails to meet marked weight account unit average below declared weight." As to weight the inspection also stated: "Reasonable shortage limit 17.25 pounds. Net weight ranges 16.50 to 19.50 pounds, average 17.90 pounds per carton." Fred Chaseley secured the agreement of both parties to the grapes being handled on a price after sale basis and instructed Complainant to invoice Respondent at the prices stated above. Mr. Chaseley also resold the grapes as Respondent's employee and apparently realized lower returns than what he instructed Complainant to invoice.

We have mentioned above that Fred Chaseley was employed by both parties to this action. Although Mr. Chaseley was apparently a person with a good track record in the produce industry, something happened that caused him to begin embezzling funds, and misdirecting checks that were entrusted to him. This was not discovered until the middle of October. As a part of this behavior pattern he failed to disclose to either of the parties to this proceeding that he was employed by the other. Such employment, of course, hopelessly compromised his loyalty to both employers as far as transactions between the two firms. Since the negotiations in regard to this transaction were all carried on through Mr. Chaseley, such negotiations cannot be viewed to have been in good faith, and are tainted by fraud. Due to the ignorance of both Complainant and Respondent as to Mr. Chaseley's unethical conduct, they cannot be deemed to be tainted by Mr. Chaseley's fraud, but, nevertheless, the transactions themselves are so tainted that it would be improper to find that a contract resulted from negotiations so compromised, unless the parties themselves, independent of Mr. Chaseley, clearly acquiesced in the contract or a modification thereof. Such is not the case with this transaction, and we conclude that Respondent is liable to Complainant only for the reasonable value of the grapes.

The inspection of the grapes shows them to have been in good condition on arrival. The underweight condition of the 1,089 cartons of Thompson Seedless grapes was cured by Respondent's repacking of these grapes with a loss of 27 cartons. Respondent charged $1.00 per carton for the repacking which we will allow against the reasonable value for which Respondent is liable. Respondent also charged $.25 for relabeling. However, Respondent failed to explain why any relabeling was necessary since the repacking should have brought the cartons up to the proper weight. This expense will, therefore, be disallowed. Market reports for Pittsburg, Pennsylvania on June 27, 1997, show that 18 pound lugs of bagged Thompson Seedless grapes, medium size, were selling for $12.50 to $13.50, and 18 pound lugs of Flame Seedless grapes, medium size, were selling for $10.00 to $12.00. Using the average of these amounts, the market value of the load, if the 1,087 cartons had not been underweight, was $25,047.00. Respondent should be

allowed the $1.00 cost of repacking, or $1,089.00, plus the value of the shrink at $13.00 per lug, or $351.00, and the cost of the two federal inspections, or $282.00. The reasonable value of the load was $23,325.00. Respondent has already paid Complainant $12,502.50, which leaves a difference of $10,822.50. Complainant on the copy of the invoice attached to the formal complaint states that only $4,752.00 is due from Respondent to Complainant on this invoice, so we will limit our award herein to this amount.

Under its invoice 791 Complainant seeks to recover $8,163.50. Respondent asserts that it never purchased or received the load. Respondent points to the bill of lading that shows the grapes shipped to Complainant at Cincinnati, Ohio, and asserts that it never received Complainant's invoice (dated 8/6/97) until November 17, 1997, when Complainant sent it by fax. Complainant's own evidence does not inspire any confidence that the load was ever received by Respondent. In an early letter sent to this Department Complainant's president Richard H. Speidell stated: "Invoice 791 was product purchased from New Leaf, Shaun Ricks and we originally showed Fries as the receiver but later found out it was received by Caruso for Hanline." Speidell claims to have sent proof of this to Hanline, but we have seen no evidence in the record that would prove Complainant's contentions by a preponderance of the evidence. We conclude that Respondent has no liability to Complainant as to the produce represented by this invoice.

By its invoice 792 Complainant seeks to recover $1,920.00 from Respondent. This represents a very similar situation to the preceding invoice. Respondent denies ever receiving or purchasing the product. Complainant stated in the same letter to this Department mentioned above:

> Invoice 792 was purchased from Western Veg. Produce in Bakersfield, salesman Doug Heitman. . . . It originally showed Caruso as the receiver but Caruso advised received for Hanline, and we so advised Hanline.

Respondent points out that the passing sheet from Western Veg-Produce shows: "Sold to A.P.S., 943 N Ronact, Visalia, CA and Ship To: A.P.S., Cincinnati." Complainant's evidence that this produce was sold to Respondent is inadequate. We conclude that Respondent has no liability to Complainant for this load of produce.

By its invoice 736 Complainant seeks payment in the amount of $2,886.00 for a shipment of lettuce. Respondent submitted documentation showing that the total amount of this invoice has been paid by two checks, and referred us to an early letter from Complainant to this Department acknowledging receipt of the two payment checks. Complainant made no reply to the payment allegations by Respondent in its answer and we conclude that there is no further liability by Respondent to Complainant as to this invoice.

Complainant's invoice 770 is for $7,233.00 and covers a load of 1,694 cartons of Red Globe grapes shipped from California to Respondent in Shelby, Ohio. Respondent rendered an accounting showing that it, in turn, had shipped the grapes to four receivers. This accounting showed that a shipment of 604 cartons returned net proceeds of $3,020.00, 616 cartons returned net proceeds of $5,082.00, 320 cartons returned net proceeds of $2,560.00, and 144 cartons returned no net proceeds. From the total returns of $10,662.00 Respondent deducted $2,350.00 for freight, and $1,662.40 for a handling fee, and remitted $6,649.60 to Complainant. Both parties agree that this load was sold on a price after sale basis. There are many problems with the way this load was dealt with by Respondent, but suffice it to say that no justification was given for the lack of returns from the 144 carton lot. Complainant restricted its claim for this load in the formal complaint to $538.40. Red Globe grapes were selling in Pittsburgh at the time for $17.50 per carton. It is clear that Respondent owes Complainant at least the amount claimed, or $538.40.

Complainant's invoices 708, 733, and 734 are for brokerage in amounts totaling $668.00 on loads sold and shipped to Respondent. Respondent has shown that it has paid brokerage to other parties on these loads. Complainant did not submit any copies of broker's memorandums of sale covering these loads, and nowhere averred that the invoices covering these brokerage amounts were in fact sent to Respondent on the dates stated on the invoices. We conclude that Complainant has failed to prove by a preponderance of the evidence that it is entitled to the payment of the brokerage amounts represented by these invoices.

The total that we have found due from Respondent to Complainant is $10,816.90. Respondent's failure to pay Complainant this amount is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.[5] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[6] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

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[5] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[6] See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $10,816.90, with interest thereon at the rate of 10% per annum from July 1, 1997, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

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